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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1263

PUBLIC SERVICE COMPANY OF INDIANA, INC.,
Petitioner,

—against—

FEDERAL POWER COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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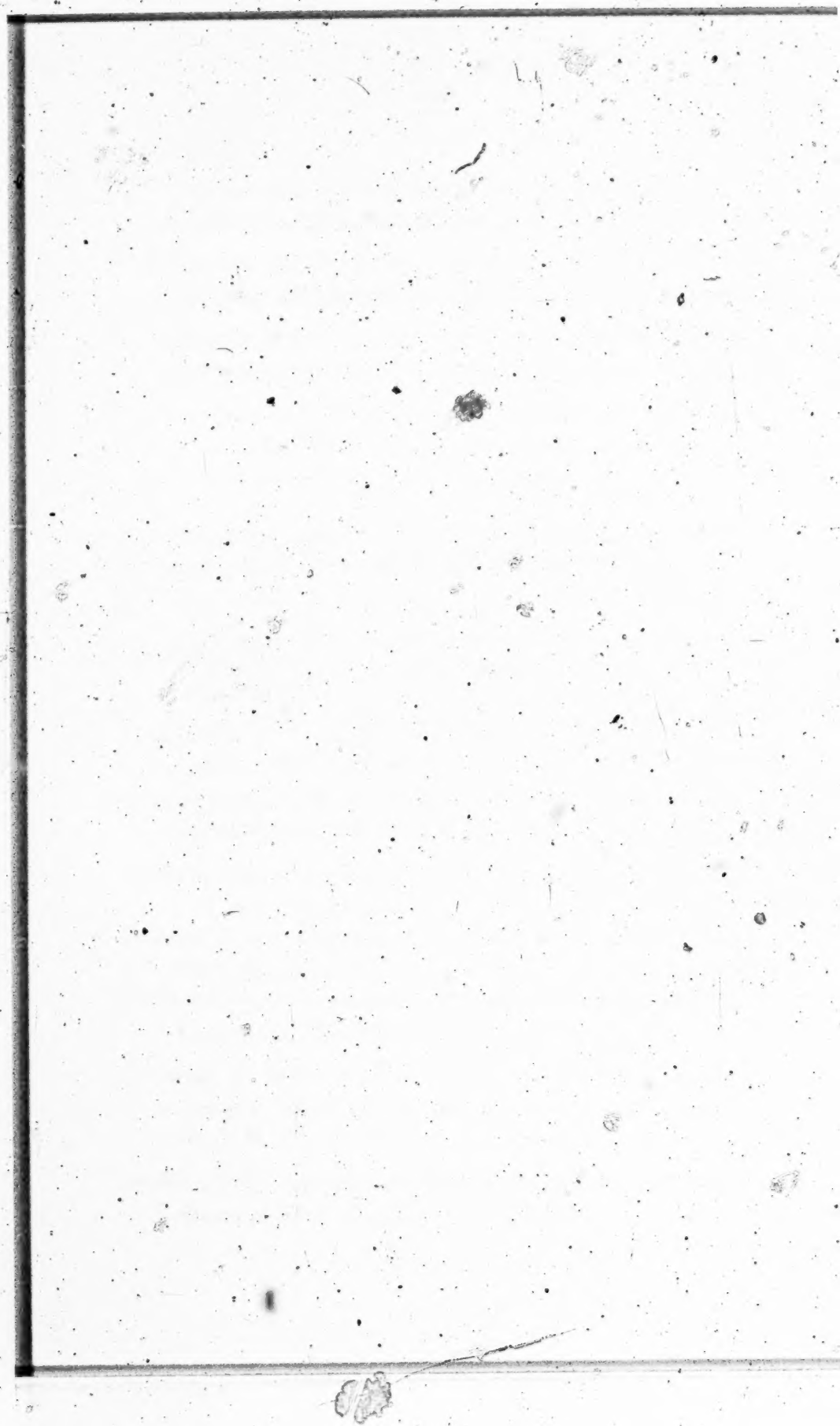

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled proceeding on January 13, 1967.

Opinions Below

The opinion issued by the Court of Appeals for the Seventh Circuit, not yet reported, is printed in Appendix A hereto. The unreported judgment of the Court of Appeals is printed in Appendix B hereto.

The opinions of the Respondent Federal Power Commission and its original order herein are reported at 34 F.P.C. 1513 and printed at pp. 471-509 (R. 11154-11181) of the Joint Appendix (Volume II) submitted to the Court below, nine copies of which are filed herewith pursuant to Rule 21, Paragraph 4 of this Court. The Federal Power Commission Opinion and Order Denying Rehearing, not yet reported, are printed at pp. 525-531 (R. 11201-11205) of the Joint Appendix (Volume II). The unreported decision of the Presiding Examiner is printed at pp. 456-470 (R. 10969-10979) of the Joint Appendix (Volume II).

Jurisdiction

The judgment of the Court of Appeals for the Seventh Circuit was dated January 13, 1967, and was entered on January 13, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Section 313(b) of the Federal Power Act, 16 U.S.C. §825*l*(b).

Questions Presented

1. Whether the Federal Power Act confers upon the Federal Power Commission jurisdiction to regulate wholesales by a public utility operating wholly within a single state of electric energy sold for redistribution wholly within such state, a portion of which energy may have originated outside such state, where such wholesales are presently being regulated by the authorities of such state, and where the entire amount of such energy as may have originated outside such state has already been rate-regulated by the Federal Power Commission?

2. Whether, in determining that certain wholesale sales of electric energy are "in interstate commerce" and subject to its jurisdiction, the Federal Power Commission is permitted to conclude that wholesale sales, made by a public utility located and independently operated solely in one state and having no corporate affiliations with any interconnected company, are subject to federal regulation on the grounds that the utility is located in "a large power pool", without any showing that energy transmitted from another state is delivered and consumed as a result of these sales (Federal Power Act §201(c))?

Statutes Involved

The following relevant statutes and their official citations are printed in Appendix C hereto:

Sections 201, 205, 206 and 313(b) of the Federal Power Act; 16 U.S.C. §§ 824, 824d, 824e, and 825*l*(b).

Statement

Petitioner Public Service Company of Indiana, Inc. is an electric utility corporation operating solely within the State of Indiana. It is not affiliated with any other electric utility or holding company.

On May 1, 1964, the Respondent Federal Power Commission (FPC or Commission) issued an order pursuant to Sections 201, 205 and 206 of the Federal Power Act (Act) initiating a investigation and hearing to determine whether sales by Petitioner to 46 municipal electric systems (municipals) and 31 rural electric membership

corporations (REMC's), all of which are located solely within the State of Indiana, were subject to the regulatory jurisdiction of the Commission. Petitioner is concededly a "public utility" as defined in §201(e) of the Act; the dispute is confined to the narrow issue of the Commission's authority to regulate sales to these customers.

The sales in question have been regulated for many years by the Public Service Commission of the State of Indiana (Indiana Commission). That Commission has regulated Petitioner's sales to its municipal customers since 1915, and its sales to its REMC customers since 1937 (R. 877-879). Regulation by the Indiana Commission has been thorough and active; it has frequently required changes to be made in rates charged these customers (R. 879-889).

Petitioner is interconnected with six neighboring public utilities, either within the State of Indiana or at the state line.* These interconnections represent the only points through which energy transmitted from a state other than Indiana can reach Petitioner's system (R. 890, 1846-1849). Sales transactions with these neighboring utility systems are not in issue in this proceeding. Rate schedules covering such service at each and every such point of interconnection have been filed with and are kept on file with the Commission and are subject to the plenary and exclusive regulatory authority of the Commission. Thus the Commission presently rate-regulates all interstate energy received by Petitioner through the several points of interconnection around the rim of its system.

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* The facts are stated herein as of the time the hearings closed on December 15, 1964. Since that time Petitioner has effected an interconnection with a seventh neighboring public utility.

Petitioner plans its system so that it can be and is operated without relying on the facilities of any other electric utility system (R. 284-287, 616). Petitioner's agreements with the utilities with which it is interconnected contain no presently effective provisions for any multi-state "pool-type" operation. None of them provides for any central discipline, assignment of generation or other regulation. Daily operations on Petitioner's system are conducted without regard to the facilities of or the loads on the system of any other electric utility, although Petitioner does effect operating economies through purchase and sales transactions over its interconnections with neighboring utilities (R. 717-718).

After hearings before a presiding examiner and exceptions to the examiner's decision, the Commission held by a 4-1 majority that the sales in question were subject to Commission jurisdiction (R. 11154-11181). The decision of the Commission was upheld by the United States Court of Appeals for the Seventh Circuit on January 13, 1967.

Reasons for Granting the Writ

1. The Commission does not have jurisdiction over the sales in question because Congress, in enacting Part II of the Federal Power Act, preserved state regulation to the fullest extent and reserved jurisdiction over these sales to the State of Indiana.

The Court of Appeals evidently believed that this Court's decision in *Federal Power Comm'n* v. *Southern Calif. Edison Co.*,* foreclosed it from any consideration of Petitioner's contention that jurisdiction over these sales

* 376 U.S. 205 (1964). The case may be referred to herein as *Southern California Edison* or the *Colton* case.

has been reserved to the State of Indiana (slip op. page 6). In any event, the Court of Appeals did not discuss the point.

This conclusion is in error. The critical difference between the cases is that in the present case all sources of interstate energy are subject to prior FPC regulation *before* any state regulation attaches. In view of this federal rim-regulation of all out-of-state inputs into Petitioner's system, which lies wholly within the State of Indiana, there is no necessity to extend federal regulation to the ensuing wholesale sales within the State of Indiana. The Commission has already fixed the price of energy at the rim of the intrastate system and the energy has lost all interstate aspects. In the words of the dissenting Commissioner below:

> "In this proceeding all facilities of PSCI are located within one State, and thereby the costs of PSCI, except for the transfers [of] out-of-state energy, are within the effective authority of the Indiana Public Service Commission. The regulatory scheme dovetails, and the issue of whether we should presume interstate power reaches each sale for resale should not be resolved against the state commission." (R. 11176)

Nevertheless, to the extent that the Court of Appeals may have been in fact restricted by this Court's decision in *Southern California Edison,* Petitioner respectfully requests that this Court reconsider its decision therein, to make clear that the Congressional intent in enacting Part II of the Federal Power Act was to provide a comprehensive federal regulatory scheme over only those sales which Congress at that time considered were *beyond the scope of state jurisdiction.* Clearly the energy delivered to the sales in question has lost all of its interstate aspects, and

regulation of these transactions was not within the contemplation of Congress when it extended Commission jurisdiction in 1935.

Indeed, the then-existing Commission was itself the principal draftsman of Part II of the Federal Power Act. During Congressional hearings prior to the bill's enactment spokesmen for the Commission continually assured Congress that the intention of the bill was to provide for federal regulation in only those instances when national control was necessary, but that the Commission did not intend to intrude upon comprehensive and constitutional state regulation.*

This continually repeated and emphasized intent to permit state regulation to the fullest possible extent consistent with effective national control has been repeated often in decisions interpreting Part II of the Federal Power Act.**

This Court's reasoning in *Connecticut Light & Power Co.* v. *Federal Power Comm'n*, 324 U.S. 515 (1945), confirms this interpretation. In that case interstate energy delivered to and sold by the Connecticut company had already been regulated by the Commission. Therefore

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* See, *e.g.*, statements of Dozier DeVane, then the Commission's Solicitor, in hearings on H.R. 5423 before the House Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess., at 495 (1935); hearings on S. 1725 before the Senate Interstate Commerce Committee, 74th Cong., 1st Sess., at 247, 249 (1935). See also H. Rep. No. 1318, 74th Cong., 1st Sess., 827 (1935); Sen. Rep. No. 621, 74th Cong., 1st Sess., 48 (1935).

The legislative history cited in *Southern Calif. Edison*, 376 U.S. at 213 n. 8, is not in conflict. Although the "general consensus" does reflect an understanding that *Public Util. Comm'n* v. *Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927), denied the states power over transactions wherein energy was sold at wholesale between states, it indicates no belief that the states lacked power to regulate rates, either at wholesale or at retail, once federal regulation over all interstate aspects of the transactions had been completed.

** See *Connecticut Light & Power Co.* v. *Federal Power Comm'n*, 324 U.S. 515, 531 (1945). See also *Federal Power Comm'n* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 19 (1961), for a parallel decision under the Natural Gas Act.

further federal jurisdiction over the Connecticut company or its wholesale rates was unnecessary and inconsistent with the legislative intent of §201 of the Act.

> "Here, * * * the federal authority to fix the sale price of the energy coming from Massachusetts in interstate commerce attaches and presumably has been or at least may be exercised pursuant to the Jersey Central holding before the energy reaches this Company. What petitioner does or fails to do is only after the incidence of federal regulation and can in no way frustrate it." 324 U.S. at 524.

State jurisdiction over the Connecticut company and its wholesale and retail sales was permissible, because it could not interfere with effective federal regulation over the national aspects of the interstate energy sold by the Connecticut company.

This Court's decision in *Southern California Edison* is consistent with both the *Connecticut* case and the position here advocated by Petitioner. *Southern California Edison* concerned a sale for resale to a municipality by a distributing company which bought energy at its generation point, carried it across state lines by means of its own transmission system into the state of ultimate consumption and then sold this energy at wholesale. The price of the energy was established by the Secretary of the Interior at the point of generation. There was, however, no sale to which FPC rate jurisdiction could attach until the sale to the municipality was made in the state of ultimate consumption.

Under these circumstances, the state regulatory agency could not effectively regulate the cost of the out-of-state energy. The state agency could not have had the assurance, as it would have had if this energy had already been

cost-controlled by the FPC when it entered the state, that the price of the energy to the distributing vendor was fair and reasonable. Effective state regulation is impossible unless energy entering the state has been rate-regulated by the FPC. *Federal Power Comm'n* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944).

In Petitioner's situation, the Indiana Commission comprehensively regulates all sales of energy within the State of Indiana. Such regulation must and does recognize as an element of the cost of service the price fixed under FPC regulation and paid by Petitioner for any energy received through its interconnections with its neighboring utility companies. The cost of such energy as regulated by the FPC is controlling in the computation of the total cost of service considered by the Indiana Commission in fixing rates (R. 890-891). Thus the Indiana Commission in fixing intrastate rates can exert jurisdiction over all such energy as if it had been generated within the State of Indiana. There is no necessity to extend FPC jurisdiction to the ensuing wholesale sales to REMC's and municipals within the State of Indiana; federal regulation has already fixed the price of any out-of-state energy that may be included, and such out-of-state energy has lost all of its interstate aspects insofar as rate regulation is concerned.

Federal jurisdiction over Petitioner's sales to its municipal and REMC customers is, therefore, as unnecessary as was federal jurisdiction over the utility in the *Connecticut* case. This Court has never allowed federal jurisdiction to supplant state regulation under these circumstances.

2. The Commission's assumption of jurisdiction over the sales in question without any substantial evidence of record that any energy delivered through these sales was generated outside of the State of Indiana is in conflict with the requirements of the Federal Power Act and the mandates of this Court.

The Court of Appeals, in upholding the Commission's assumption of jurisdiction, described the basis for it as follows:

> "The ultimate finding of the Commission upon which it asserted jurisdiction is substantially that PSCI's interconnections with other public utilities locates it in a 'large power pool' from which PSCI receives 'large quantities' of out-of-state energy resulting in 'pool sales' subject to Commission regulation." (slip op. p. 2)

Section 201(c) of the Federal Power Act (49 Stat. 847; 16 U.S.C. 824(c) (1964)) defines electric energy ". . . as transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof . . ."

Proof that electric energy generated in a state other than Indiana was delivered to each of Petitioner's municipal and REMC customers is thus an essential element of an assertion of jurisdiction over these sales. The type of proof required to establish the transmission of electric energy in interstate commerce has been set forth clearly by this Court. The evidence must be "engineering and scientific rather than . . . legalistic or governmental . . ." (*Connecticut Light & Power Co.* v. *Federal Power Comm'n*, 324 U.S. 515, 529 (1945); quoted with approval in *Federal Power Comm'n* v. *Southern Calif. Edison Co.*, 376 U.S. 205, 209 n. 5 (1964)). See also *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366, 369 (1965).

The Commission did not attempt to meet the "engineering and scientific" test, resting its determination instead on the purely conceptual ground that Petitioner is a member of "an interstate power pool" and that Petitioner's sales are ". . . as a consequence, sales made from an interstate pool." (R. 11158) The court below not only accepted the Commission's conceptual approach but expanded upon it. The court stated that Petitioner "...is interconnected in the same interstate network to which I&M and Arkansas Light & Power are connected. Within that network, there are several more highly integrated 'power pools,' one of which includes PSCI."* No attempt was made either by the Commission or by the Court of Appeals to define the extent of these "power pools."

The Court of Appeals has thus ignored the fundamental differences between Petitioner's system and those of large, multi-state holding companies. Whether or not the characteristics of the latter type of system require the Commission to abandon methods of proof previously employed by the Commission and approved by this Court, such departures are clearly not required by the facts in this proceeding. Petitioner believes that the Commission's adoption of such arbitrary procedures merits review by this Court.

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* The Court's mention of "I&M" and "Arkansas Light & Power" referred to previous Commission findings of jurisdiction over sales which were upheld by the courts. (*Indiana & Michigan Electric Co.* v. *Federal Power Comm'n*, 365 F.2d 180 (7th Cir. 1966); *cert. denied*, 385 U.S. 972 (1966); and *Arkansas Light & Power Co.* v. *Federal Power Comm'n*, 368 F.2d 376 (8th Cir. 1966). However, both of these cases involved sales from a multi-state holding company system in which energy was generated and sold throughout the system on an economy basis without regard to state lines.

Conclusion

For the reasons set forth herein, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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